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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,
v.

KING BROWN,
Respondent.

On Petition for a Writ of Certiorari to the
New York Court of Appeals

**SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS**

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In the court below(and in our petition for a writ of certiorari) we urged a two-step analysis in determining whether, under the Double Jeopardy Clause, a prosecutor may appeal in cases such as this. First, the court must determine whether a successful government appeal would require a new trial. If so, then the court must determine whether the ruling appealed from was an "acquittal". The court below rejected our argument and held instead that there was only one consideration in determining whether

the state could appeal in this case—whether a successful appeal would require a new trial. Therefore, although agreeing that there had been no acquittal in this case, the Court of Appeals nonetheless affirmed the dismissal of the People's appeal.

In the recent case of *United States v. Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, this Court appears to have accepted the analysis rejected by the court below. Since a successful government appeal in *Martin Linen* obviously would have required a second trial, the Court went on to determine whether the judgment appealed from was an "acquittal". This Court held that under Rule 29 of the Federal Rules of Criminal Procedure, the trial judge had the power to acquit and that he had, in fact, done so. The trial court had entered "valid judgments of acquittal . . . on the express authority of, and strictly in compliance with, Rule 29(c)." *United States v. Martin Linen Supply Co.*, *supra*, slip op. at 6.

This case is entirely different. The New York legislature has not given trial judges the power to acquit defendants in the midst of trial. Indeed, in 1972, the state legislature amended the Criminal Procedure Law to make clear its intention that the trial judge's powers be limited to dismissing counts of an indictment based on legal issues alone. The purpose of the change was to allow the People to appeal from such dismissals. (See Petn. at 8-11.) Moreover, in the instant case, there can be no argument that the trial judge acquitted the defendant even though unauthorized to do so. The judge's "dismissal" was based entirely on his (erroneous) legal conclusion about what constituted the elements of the offense of bribery. (See Petn. at 4-7,

22-23, n.11.) There was no acquittal because there was no resolution whatever "of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, *supra*, slip op. at 7.

We do not believe much would be gained by remanding this case for the New York Court of Appeals to express a view about whether there had been an acquittal in this case. The opinion below already makes it clear enough that in that Court's view there had been no acquittal. The Court of Appeals stated the issue before the trial judge as follows: "There was thus presented to the trial court a pure question of law, namely, what constitutes the crime of bribery!" (Petn. at 16a.) Later, the Court said that the trial judge had dismissed the indictment in this case based "on a pure question of law" (Petn. at 20a; see also Petn. at 21a, 26a.) In dissent, Judge BREITEL also concluded that it was "clear beyond a doubt that no factual issue has been resolved in favor of defendant on the trial." (Petn. at 30a.)

Conclusion

For these reasons, and for the reasons expressed in the prior submissions to the Court, the writ of certiorari should be granted.

Respectfully submitted,

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